* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: 26th April, 2022

\+ CS(COMM) 1136/2018 & I.A. No.7598/2020 (u/O-XI R-1(5) of CPC)

TOSHIAKI AIBA AS THE BANKRUPTCY TRUSTEE OF THE ESTATE OF VIPAN KUMAR SHARMA ..... Plaintiff

Through: Mr. Gopal Jain, Senior Advocate with Ms. Savita Sarna, Advocates.

versus

VIPAN KUMAR SHARMA & ANR. ..... Defendants

Through: Mr. Shashank Garg with Mr. Aman Gupta, Ms. Nishtha Jain and Ms. Neenu Jagadish, Advocates for D-1.
Mr. Divyakant Lahoti with Mr. Kartik Lahoti, Advocates for D-2.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J. (Oral)

I.A. No.6242/2020 (of the defendant no.2 u/O-VII R-11 of CPC)

1. The present application has been filed on behalf of the applicant/defendant no.2 under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) seeking rejection of the plaint.

2. Notice was issued in this application on 29th July, 2020. Pursuant thereto, reply has been filed on behalf of the non-applicant/plaintiff.

3. Brief facts necessary for deciding the present application, as set out in the plaint, are set out below:

(i) Between 16th July, 2013 and 20th October, 2014, five separate loan agreements were executed between the Bank of Tokyo Mitsubishi UFJ Ltd. (BTMU), a bank incorporated in Japan, and various companies engaged in the business of shipping.

(ii) In respect of the aforesaid loan agreements, guarantees were given by the defendant no.1 in favour of BTMU.

(iii) Due to failure on the part of the borrowers to repay the loan amounts, an Acceleration Notice dated 10th November, 2015 was issued by BTMU to the defendant no.1 in terms of which the loan amounts were recalled.

(iv) The aforesaid notice was duly received by the defendant no.1 on 12th November, 2015.

(v) Upon failure of the defendant no.1 to repay his debts, the Tokyo District Court, vide order dated 4th January, 2016 declared the defendant no.1 as bankrupt and appointed the plaintiff as the Bankruptcy Trustee Administrator.

(vi) The plaintiff was appointed as a Bankruptcy Trustee in accordance with the provisions of the Bankruptcy Act (Act No. 75 of June 2, 2004) of Japan (hereinafter referred to as the 'Japanese Bankruptcy Act') to recuperate the necessary amounts against the estate of the defendant no.1.

(vii) The defendant no.1 challenged the bankruptcy order of the Tokyo District Court by filing an appeal before the Tokyo High Court.

(viii) The Tokyo High Court dismissed the aforesaid appeal vide detailed judgment dated 17th June, 2016 and upheld the order passed by the Tokyo District Court. Thereafter, the defendant no.1 filed an appeal

before the Supreme Court of Japan, which was dismissed vide order dated 16th September, 2016.

(ix) After taking over as the Bankruptcy Trustee in respect of the estate of the defendant no.1, the plaintiff conducted an investigation in India and around November, 2017, the plaintiff came to know that the defendant no.1 was the owner of the following properties in India:

a. The ground floor of a building on a land bearing no. 216, in Block 172, situated in Jor Bagh, New Delhi ('Property No.1') with valuation of approx. INR 8,37,00,000/-; and,

b. One-fourth (1/4th) undivided share in the first floor of a building on a land bearing number no. 216, in Block 172, situated in Jor Bagh, New Delhi ('Property No.2') with valuation of approx. INR 2,09,25,000/-.

(The Property 1 and Property 2 shall collectively be referred to as the 'suit properties')

(x) The Property No.1 was purchased by the defendant no.1 vide a registered Sale Deed dated 8th July, 2002 and the Property No.2 was inherited by the defendant no.1 from his mother, who died intestate on 11th February, 2010.

(xi) Upon receipt of the Acceleration Notice on 12th November, 2015, apprehending that his aforesaid properties may be attached by the Tokyo District Court, the defendant no.1 to defraud BTMU and other creditors and in collusion with the defendant no.2, executed in Japan, (i) a Special Power of Attorney dated 17th November, 2015 in favour of his relative, Mr. Shitiz Sharma in respect of Property No.1, and (ii) a Special Power of Attorney dated 17th November, 2015 in favour of

his sister, Mrs. Renu Gaur in respect of Property No.2 (collectively be referred to as the 'SPAs')

(xii) On the basis of the aforesaid SPAs, Property No.1 was transferred in favour of the defendant no.2 vide registered Gift Deed dated 23rd November, 2015 and the registered Relinquishment Deed dated 8th January, 2016 was executed, along with other siblings, in respect of Property No.2 in favour of the defendant no.2.

(xiii) The present suit was filed invoking the following provisions of the Japanese Bankruptcy Act:

> *"Articles 2(12) and 2(14) of Japanese Bankruptcy Act define the 'bankruptcy trustee' and the 'bankruptcy estate', respectively, as under:*
>
> *"Article 2(12): The term "bankruptcy trustee" as used in the Act means a person who has a right to administer and dispose of property that belongs to the bankruptcy estate in bankruptcy proceeding;*
>
> *Article 2(14): The term "bankruptcy estate" as used in the Act means a bankrupt's property, inherited property or trust property for which a bankruptcy trustee has an exclusive right to administration over and disposition of in the bankruptcy proceedings;"*
>
> *b) Article 34(1) of the Japanese Bankruptcy Act lays down the following:*
>
> *"Any and all property that the bankrupt holds at the time of commencement of bankruptcy proceedings (irrespective of whether or not it exists in Japan) shall constitute the bankruptcy estate."*
>
> *c) Article 80 of the Japanese Bankruptcy Act lays down the following:*

"In an action relating to the bankruptcy estate, a bankruptcy trustee shall stand as a plaintiff or defendant.""

4. Based on the aforesaid pleadings, the following reliefs have been sought in the plaint:

(i) a decree of declaration in favour of the Plaintiff and against the Defendants, declaring the Gift Deed dated November 23, 2015, and the Relinquishment Deed dated January 8, 2016 to the extent of the relinquishment of the one-fourth (1/4th) undivided share of the defendant no.1 in the first floor of a building on a land bearing number no. 216, in Block 172, situated in Jor Bagh, New Delhi (i.e. the Property 2), as void under Section 53 of the Transfer of Property Act, 1882;

(ii) a decree of declaration in favour of the Plaintiff to administer the Ground Floor of a building on a land bearing number no. 216, in Block 172, situated in Jor Bagh, New Delhi (i.e. the Property 1) and the defendant no.1's one-fourth (1/4th) undivided share in the First Floor of the aforesaid property (i.e. the Property 2), and to take the possession of the said Suit Properties and/or any other incidental/further action in this regard, and further sell or dispose of the same as a vendor and receive and appropriate the sale proceeds thereof for realization of debts;

(iii) a decree of permanent injunction in favour of the Plaintiff and against the Defendants, their successors, heirs, representatives or agents, restraining them from selling, alienating, disposing of parting with possession, or creating third party interest in the Property 1 (i.e. the ground floor of a building on a land bearing number no. 216, in Block

172, situated in Jor Bagh, New Delhi)and the Property 2 (i.e. one-fourth (1/4th) undivided share of the defendant no.1 in the first floor of a building on a land bearing number no. 216, in Block 172, situated in Jor Bagh, New Delhi);

5. In support of his application under Order VII Rule 11 of the CPC, the counsel appearing on behalf of the defendant no.2 has made the following submissions:

(i) The present suit is not a commercial suit as it seeks to enforce rights in respect of a residential property. Reliance in this regard is placed on the judgments of the Supreme Court in ***Ambalal Sarabhai Enterprises Limited*** **v.** ***K.S. Infraspace LLP and Another***, (2020) 15 SCC 585 and ***Soni Dave*** **v.** ***Trans Asian Industries Expositions Pvt. Ltd.***, AIR 2016 Del 186.

(ii) There is no *locus standi* on the part of the plaintiff to file the suit. No permission has been taken from the competent court in Japan to file the present suit and no permission has also been taken to appoint the representative of the Bankruptcy Trustee. Reliance in this regard is placed on Article 77 and Article 78 of the Japanese Bankruptcy Act.

(iii) There is no cause of action to file the present suit as the plaintiff has failed to file the loan agreements, the guarantee agreements and the details of the amounts due in respect of the defendant no.1. In this regard, reliance is placed on the judgment of the Bombay High Court in ***Marine Geotechnics LLC*** **v.** ***Coastal Marine Construction& Engineering Ltd.***, 2014 SCC OnLine Bom 309.

(iv) Japan is not a reciprocating territory in respect of Section 44-A of the CPC, so there cannot be any proceedings for execution for executing the decree of the Japanese Court.

(v) The bankruptcy order passed by the Japanese Court has no evidentiary value in India.

(vi) The Indian insolvency regime viz., the Insolvency and Bankruptcy Code, 2016 does not recognize cross border insolvency and the defendant no.1 has not been declared as insolvent in India.

(vii) The present suit is barred by limitation. In terms of Article 176 of the Japanese Bankruptcy Act, the prescribed period of limitation is two years. In the present case, the order declaring the defendant no.1 as bankrupt was passed by the District Court in Japan on 4th January, 2016, whereas the present suit was filed on 20th September, 2018. Therefore, the suit is barred by limitation.

(viii) While considering limitation, the limitation law of the 'cause country' should be applied even in the forum country, i.e., the Japanese law of limitation has to be applied instead of the Limitation Act, 1963. Reliance is placed on the judgment in ***Bank of Baroda* v. *Kotak Mahindra Bank Ltd.***, 2020 SCC OnLine SC 324.

(ix) A suit can be rejected under the provisions of Order VII Rule 11 of the CPC on the ground of limitation. In this regard, reliance is also placed on the judgment of Supreme Court in ***Raghwendra Sharan Singh* v. *Ram Prasanna Singh (Dead) by Legal Representatives***, (2020) 16 SCC 601.

6. The counsel appearing on behalf of the defendant no.1 has adopted the submissions made on behalf of the defendant no.2. He has further

submitted that the order dated 4th January, 2016 passed by the District Court in Japan was challenged by the defendant no.1 in appeal and the same was upheld by the Appellate Court and the subsequent appeal was dismissed by the Supreme Court of Japan.

7. On behalf of the plaintiff, the following submissions have been made:

(i) At the stage of deciding an application under Order VII Rule 11 of the CPC, reference only has to be made to the alleged plaint and the documents filed along with the plaint.

(ii) Since the suit arises from a loan transaction, it is maintainable as a commercial suit under the Commercial Courts Act.

(iii) The judgment dated 3rd September, 2018 passed by the Appellate Court is a detailed and reasoned judgment and therefore, exceptions provided under Section 13 of the CPC would not be applicable.

(iv) Reliance is placed on the doctrine of comity to submit that the Indian Courts regularly enforce judgements of foreign court.

(v) That various documents, including the SPAs and the Relinquishment Deed, were executed by the defendants in collusion with each other soon after the Acceleration Notice was served upon the defendant no.1, in order to defraud the creditors in Japan.

(vi) There is no bar under the Insolvency and Bankruptcy Code, 2016 (IBC) for initiating the present suit.

(vii) Limitation has to be calculated under Indian law and in terms thereof the period of limitation is three years, as provided under Article 101 of the Limitation Act. Therefore, the suit is within time.

(viii) The plaint cannot be rejected if the issue of limitation is a mixed question of facts and law.

8. I have heard the counsel for the parties.

9. Shorn of any legal niceties, it is evident from the facts narrated above that upon receiving the Acceleration Notice on 12th November, 2015, fearing commencement of bankruptcy proceedings in Japan, the defendant no.1 within six days, executed the SPAs in respect of the suit properties on 17th November, 2015. The defendant no.1, apprehending threat to his properties in India, executed a Gift Deed dated 23rd November, 2015 in favour of the defendant no.2. Immediately upon the defendant no.1 being declared bankrupt by the Tokyo District Court vide order dated 4th January, 2016, the Relinquishment Deed dated 8th January, 2016 was executed by the defendant no.1 and his sisters in favour of their brother, the defendant no.2. Clearly, these appear to be fraudulent and collusive acts done by both the defendants in order to defeat the interest of the creditors in Japan. It is also a matter of record that the aforesaid documents were executed without any consideration. Therefore, on a prima facie view, it appears that the defendant no.2 is not a bona fide purchaser of the Property No.2 and the aforesaid transfer in favour of the defendant no.2 is a fraudulent transfer in terms of Section 53 of the Transfer of Property Act.

10. Now, I propose to discuss the various grounds raised on behalf of the defendants invoking provisions of Order VII Rule 11 of CPC.

11. The first ground raised on behalf of the defendants is that the present suit cannot qualify as a 'commercial dispute' under the Commercial Courts Act, as the suit properties are residential properties.

12. To appreciate this submission, reference in this regard may be made to relevant provisions of the Commercial Courts Act, which are reproduced as under:

"2. ***Definitions.****— (1) In this Act, unless the context otherwise requires,—*

…

*(c) "**commercial dispute" means a dispute arising out of**—*

(i) ***ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents****;*

…

Explanation.—A commercial dispute shall not cease to be a commercial dispute merely because—

(a) ***it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property****;*

…"

13. The cause of action for filing the present suit is the default of the defendant no.1 in respect of his loan obligations towards the bankers/financiers in Japan, resulting in him being declared bankrupt by the competent Courts in Japan. The suit has been filed to administer the suit properties of the bankrupt defendant no.1 towards realization of monies. So, it is squarely covered by the language of Section 2(1)(c) of the Commercial Courts Act and the Explanation thereto. Therefore, it would be irrelevant if the said properties, in respect of which relief is claimed, are residential properties or not and the present suit would be maintainable as a commercial suit.

14. In view of the above, the judgments in ***Ambalal*** (supra) and ***Soni Dave*** (supra) are completely distinguishable and do not apply to the facts of the circumstances of the present case. In ***Ambalal Sarabhai Enterprises Limited*** (supra), the very relief sought was for execution of the mortgage

deed, which was held to be in the nature of specific performance of the terms of memorandum of understanding, without reference to nature of the use of the immovable property in trade or commerce as on the date of the suit. Furthermore, the judgment in ***Soni Dave*** (supra) was delivered in the context of an agreement to sell in respect of a residential property and the suit was held to not be a commercial suit in terms of Section 2(1)(c)(vii) of the Commercial Courts Act, which is not the case here.

15. Even otherwise, if the suit is not taken to be a commercial suit, this Court has the power to convert a commercial suit into an ordinary suit and proceed to hear the matter. This cannot be a ground for rejection of the suit. The suit has been valued in excess of Rs. 10 crores and ad valorem court fees thereon has been paid by the plaintiff. It is not denied that this Court has the territorial and the pecuniary jurisdiction to hear the present suit, even if it is taken to be an ordinary suit.

16. The next submission made on behalf of the defendants is that there is no cause of action to file the present suit as the plaintiff has failed to produce loan documents as well as the guarantee agreements or the details of outstanding amounts. The present suit has been filed only towards administration of assets of the defendant no.1 and not for recovery of the loan amounts from the defendant no.1. Therefore, there is no merit in the contention of the applicant/defendant no.2 that the plaintiff was obligated to file the loan documents as well as the guarantee agreements or the details of outstanding amounts. It is not the defendants' case that nothing is due from the defendants to the creditors in Japan. In any event, the amounts so due would be the subject matter of trial and cannot be ground for rejection of the plaint under provisions of Order VII Rule 11 of the CPC. The scope of

application under Order VII Rule 11 of the CPC is limited only to the extent whether or not in terms of averments made in the plaint and the documents filed along with the plaint, the suit is maintainable. Reference in this regard may be to judgments of the Supreme Court in ***Dahiben* v. *Arvindbhai Kalyaniji Bhanusali (Gajra) Dead Through Legal Representatives and Ors.***, 2020 (7) SCC 366 and ***Srihari Hanumandas Totala* v. *Hemant Vithal Kamat and Others***, 2021 SCC OnLine SC 565.

17. Next, it is contended on behalf of the defendants that Japan is not a reciprocating territory in respect of Section 44A of the CPC, so there cannot be any proceedings for execution of the decree of a Japanese Court.

18. In the opinion of this Court and as stated above, by the way of the present suit, the plaintiff is not seeking execution of the decree of the Japanese Court. Tthe suit has been filed to administer the suit properties of the bankrupt defendant no.1 towards realization of monies. Therefore, Section 44A of the CPC would have no application.

19. It is further contended on behalf of the defendants that the order dated 4th January, 2016 passed by the Tokyo District Court has no evidentiary value in India, as it is passed by the court of a non-reciprocating territory.

20. In this regard, reference may be made to Sections 13 and 14 of the CPC, which deal with foreign judgments. The same are set out below:

> *"**13. When foreign judgment not conclusive.**—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—*
>
> *(a) where it has not been pronounced by a Court of competent jurisdiction;*
>
> *(b) where it has not been given on the merits of the case;*

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [1][India] in cases in which such law is applicable;
(d) where the proceedings in which the judgment was obtained are opposed to natural justice;
(e) where it has been obtained by fraud;
(f) where it sustains a claim founded on a breach of any law in force in [1][India].

***14. Presumption as to foreign judgments.**—The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction."*

21. In ***Alcon Electronics Private Limited* v. *Celem S.A. of FAO 34320 Roujan, France and Another***, (2017) 2 SCC 253, while analysing the aforesaid provisions, the Supreme Court has observed as under:

*"14. **A plain reading of Section 13 CPC would show that to be conclusive an order or decree must have been obtained after following the due judicial process by giving reasonable notice and opportunity to all the proper and necessary parties to put forth their case**. When once these requirements are fulfilled, the executing court cannot enquire into the validity, legality or otherwise of the judgment.*

*15. **A glance on the enforcement of the foreign judgment, the position at common law is very clear that a foreign judgment which has become final and conclusive between the parties is not impeachable either on facts or law except on limited grounds enunciated under Section 13 CPC. In construing Section 13 CPC we have to look at the plain meaning of the words and expressions used therein and need not look at any other factors. Further, under Section 14 CPC there is a presumption that the foreign court which passed the order is a court of competent***

jurisdiction which of course is a rebuttable presumption. In the present case, the appellant does not dispute the jurisdiction of the English Court but its grievance is, it is not executable on other grounds which are canvassed before us*."*

22. Reference may be made to the following observations of the Bombay High Court in ***Marine Geotechnics LLC*** **v.** ***Coastal Marine Construction & Engineering Ltd.***, 2014 SCC OnLine Bom 309, which are as under:

"21. ***Armed with a decree of a court in a non-reciprocating foreign territory, what must a party do in India? His option is to file, in a domestic Indian court of competent jurisdiction, a suit on that foreign decree, or on the original, underlying cause of action, or both. He cannot simply execute such a foreign decree. He can only execute the resultant domestic decree. To obtain that decree, he must show that the foreign decree, if he sues on it, satisfies the tests of Section 13.*** *If the decree is, on the other hand, of a court in a reciprocating territory, then he can straightaway put it into execution, following the procedure under section 44A and Order XXI, Rule 22 of the CPC. At that time, the judgment-debtor can resist the decree-holder by raising any of the grounds under Section 13. If he does not, or fails in his attempt, the decree will be executed as if it were a decree passed by a competent court in India."*

23. Applying the aforesaid principles to the facts of the present case, it cannot be said that judgment dated 17th June, 2016 of the Tokyo High Court, dismissing the appeal filed on behalf of the defendant no.1, falls under any of the exceptions provided in Section 13 above. On the face of it, the aforesaid judgment fulfils the requirement of due process and was passed after noting the various contentions raised on behalf of the defendant no.1. Therefore, the aforesaid judgment would be conclusive as to the defendant no.1 being declared bankrupt in Japan and the plaintiff being appointed as the bankruptcy trustee to administer the estate of the defendant no.1, even

outside Japan. The plaintiff, who is the bankruptcy trustee, in the present proceedings is not seeking to execute the aforesaid judgment in terms of Section 44A of the CPC, but is acting in furtherance of the said judgment so as to administer the estate of the defendant no.1, who has been adjudicated as being bankrupt in Japan. There is no bar under the provisions of the IBC against filing such a suit. Therefore, there is no merit in the contention that the plaintiff does not have the locus standi to file the present suit.

24. The Supreme Court in ***Alcon Electronics Private Limited*** (supra) has recognized the principles of comity of nation so as to respect the decisions of foreign courts. In this regard, reference may be made to the following paragraphs:

> *"19.* ***The principles of comity of nation demand us to respect the order of English Court. Even in regard to an interlocutory order, Indian Courts have to give due weight to such order unless it falls under any of the exceptions under Section 13 CPC.*** *Hence we feel that the order in the present case passed by the English Court does not fall under any of the exceptions to Section 13 CPC and it is a conclusive one. The contention of the appellant that the order is the one not on merits deserves no consideration and therefore liable to be rejected. Accordingly, Issue (i) is answered.*
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> *XXX XXX XXX*
>
> *37.* ***It is to the reciprocal advantage of the courts of all nations to enforce foreign rights as far as practicable. To this end, broad recognition of substantive rights should not be defeated by some vague assumed limitations of the court. When substantive rights are so bound up in a foreign remedy, the refusal to adopt the remedy would substantially deprive parties of their rights. The necessity of maintaining the foreign rights outweighs the practical difficulties involved in applying the foreign remedy.*** *In India, although the interest on costs are not available due to exclusion of Section 35(3), the same does not mean that Indian*

Courts are powerless to execute the decree for interest on costs. Indian Courts are very much entitled to address the issue for execution of the interest amount. The right to 8% interest as per the Judgments Act, 1838 of UK can be recognised and as well as implemented in India."

25. In this regard, reference may also be made to the observations of the Division Bench of this Court in ***SRM Exploration Pvt. Ltd.*** **v.** ***N & S & N Consultants S.R.O.***, 2012 SCC OnLine Del 1714. The observations are as under:

"13. ***…The world is a shrinking place today and commercial transactions spanning across borders abound.*** *We have wondered whether we should be dissuaded for the reason of the transaction for which the appellant Company had stood surety/guarantee being between foreign companies.* ***We are of the opinion that if we do so, we would be sending a wrong signal and dissuading foreign commercial entities from relying on the assurances/guarantees given by Indian companies and which would ultimately restrict the role of India in such international commercial transactions.****"*

26. Applying the aforesaid principles, the judgments passed by the foreign courts have to be respected by the Indian Courts, unless the same are shown to be falling under the limited exceptions provided in Section 13 of the CPC. The Plaintiff, being the Bankruptcy Trustee appointed by the Japanese court, is seeking the assistance of the courts in India, to administer assets of defendant no. 1 in India. There is no reason why a person who has been declared bankrupt by a foreign court in terms of the law applicable to that jurisdiction, should be afforded protection by the Indian Courts on technical objections being raised with regard to the validity of the foreign

judgment. In the modern times of globalization, foreign creditors cannot be treated differently from domestic creditors.

27. Finally, the defendants have placed reliance on various provisions of Japanese law to submit that (i) present suit is time barred; and, (ii) the requisite permissions that were required to be taken in respect of filing the present suit have not been taken.

28. At the stage of deciding an application under Order VII Rule 11 of the CPC, the Court cannot take into account the various provisions of foreign law. The issues involved would also be in respect of whether provisions of Japanese law, relied upon by the defendants, would be applicable to suits filed outside Japan. This Court would be hesitant to take a view on issues of Japanese law in the absence of an expert opinion on Japanese law. In this regard, reference may be made to Section 45 of the Indian Evidence Act, 1872, which is set out below:

> *"45.* ***Opinions of experts.—When the Court has to form an opinion upon a point of foreign law*** *or of science or art, or as to identity of handwriting*[35] *[or finger impressions],* ***the opinions upon that point of persons specially skilled in such foreign law****, science or art,*[36] *[or in questions as to identity of handwriting]*[35] *[or finger impressions]* ***are relevant facts****. Such persons are called experts."*

29. In ***Technip SA* v. *SMS Holding (P) Ltd. and Others***, (2005) 5 SCC 465, the Supreme Court has analysed various provisions of French law on the basis of opinions of experts relied upon by the parties. It was specifically noted therein that under Section 45 of the Indian Evidence Act, the Court can take admitted position into consideration to form an opinion as to the text of the relevant French law. In the present case also, elaborate reliance

has been placed on behalf of the defendant no.2 on various provisions of the Japanese law. However, the Court cannot form an opinion on the said provisions of Japanese law in the absence of expert opinions on Japanese law having been filed by the parties.

30. A further issue that would arise is whether an Indian Court can dismiss a suit filed by a foreign party on the ground that the same is barred under the Japanese law. Clause (d) of Order VII Rule 11 of the CPC states that the plaint can be rejected where the suit appears, from the statement in the plaint, to be barred by 'any law'. Obviously, the reference to 'any law' in the aforesaid provision is to an Indian law. The phrase 'any law' cannot be in the context of the law of a foreign country. Therefore, I do not find any merit in the submission that the present plaint can be rejected under the provisions of Order VII Rule 11(d) of the CPC, as being barred under the provisions of Japanese law.

31. Furthermore, in my view, for a suit filed in India, the limitation would have to be seen under the Indian law and not foreign law. In terms of Article 101 of Schedule to the Limitation Act, the prescribed period of limitation is three years from the date of a judgement, including foreign judgement. It is not the case of the defendants that the present suit is time barred under the Indian laws of limitation. The judgment of the Supreme Court in ***Bank of Baroda*** (supra) was in the context of limitation for the execution of a foreign decree under Section 44A of the CPC. It was in that context that the Supreme Court gave a finding that the issue of limitation is a matter of substantive law and not procedural law.

32. Therefore, the present suit cannot be rejected on the ground of limitation at the present stage. Accordingly, the judgment cited on behalf of

the defendants in ***Raghwendra Sharan Singh*** (supra) will not be applicable in the facts and circumstances of the case.

33. In view of the aforesaid discussion, there is no merit whatsoever in the application of the applicant/defendant no.2 under Order VII Rule 11 of the CPC. It has been filed only to delay the proceedings in the suit. The same is dismissed with costs of Rs.1,00,000/- payable by the defendant no.2.

34. Needless to state any observations made herein are only for the purposes of deciding the present application and would have no bearing on the final adjudication of the suit.

I.A.7598/2020 (u/O-XI R-1(5) of the CPC)

35. The present application has been filed by the plaintiff under provisions of Order XI Rule 1(5) of the CPC as applicable to commercial disputes seeking leave of the court to file additional documents as described in paragraph 4 of the said application.

36. It is stated in the application that the documents that are subject matter of the present application were in Japanese language and had to be translated into English. Consequently, these documents could not be filed with the plaint and therefore, have been filed along with the replication. All the aforesaid documents sought to be brought on record have been referred to in the plaint and are vital for proper and effective adjudication of the case. It is further submitted that the suit is at an early stage and issues are yet to be framed.

37. Reply has been filed on behalf of the defendant no.1 in opposition to the present application. It is stated therein that the plaintiff had the said documents in its possession at the time of filing of the suit and therefore, the

said documents not having been filed with the suit, should not be allowed to be taken on record at this stage.

38. In my considered view, the aforesaid documents are necessary for the proper and effective adjudication of the present suit. Further, the aforesaid documents were filed by the plaintiff along with the replication and before the issues have been framed in the suit. The plaintiff has given sufficient reasons for not filing the aforesaid documents along with the plaint, as these documents were in Japanese and had to be translated into English before the same could be filed in Court. Reference in this regard may be made to the decision of this Court in ***Hassad Food Company Q.S.C. & Anr.*** **v.** ***Bank of India & Ors.***, 2019 SCC OnLine Del 10647, followed by me in ***Khurmi Associates (P) Ltd.*** **v.** ***Maharishi Dayanand Co-Operative Group Housing Society***, 2022 SCC OnLine Del 1011. Relevant portions of ***Hassad Food Company Q.S.C.*** (supra) are set out below:

> *"13. Perusal of Order XI as noted above reveals that the plaintiff is bound to file all documents in its power, possession, control or custody with the plaint and in case of urgent filing of a suit if some additional documents are to be filed under sub-rule (1) of Rule 1 of Order XI, the plaintiff may seek leave of the Court to rely on additional documents which additional documents are required to be filed within 30 days of filing of the suit. Under sub-rule (5) of Rule 1 of Order XI, the plaintiff shall not be allowed to rely on documents which were in the plaintiff's power, possession, control or custody and not disclosed along with the plaint or within the extended period save and except by leave of the Court which leave can be granted only if the plaintiff establishes reasonable cause for non-disclosure along with the plaint.* ***The language used in the sub-rule (5) is that the plaintiff is required to show "a reasonable cause" and not a "sufficient cause" as is ordinarily provided in other provisions.*** *14. While dealing with Order XIII Rule 2 CPC wherein the words used are: "unless good*

cause is shown", the Supreme Court in the decision reported as (2002) 1 SCC 535 Madanlal v. Shyamlal, noted the distinction between "good cause" and "sufficient cause" and held that "good cause" requires a lower degree of proof as compared to "sufficient cause" and thus the power under Order XIII Rule 2 CPC should be exercised liberally. ***Sub-Rule (5) of Rule 1 of Order XI of the Commercial Courts Act, 2015 uses the phrase "reasonable cause" which would require even a lower degree of proof as compared to "good cause".***

15. Thus it is to be seen in the present case whether the plaintiff who is required to file voluminous documents inadvertently misses out certain documents which are in line with the documents already filed and further the case of the plaintiffs and does not set up of a contrary case, would be a reasonable cause permitting the plaintiffs to file additional documents at this stage when pleadings are not complete as yet for the reason the replications of the plaintiffs have not been taken on record as yet. *The plaintiffs along with suit has filed more than 2000 documents, the nature of the suit is commercial wherein the plaintiff No.1 furnished corporate guarantee and plaintiff No.2 invested money with Bush Foods pursuant to the representations of the BOI consortium who are the defendants. By these additional documents, the plaintiffs want to further demonstrate the conduct of the defendant banks which would show correspondence between Bush Foods and defendant Banks and that to the knowledge of the defendant banks the financial condition of Bush Foods was not healthy and the said facts were concealed from the plaintiffs rather representations were made that Bush Foods have assets justifying the investment inducing plaintiff No.1 which was made to execute a corporate guarantee and plaintiff No.2 to invest the money. The plaintiffs have thus made out a case of egregious fraud against the defendant banks.*

18. In the pleas taken in the present application the defendants neither dispute the relevancy of the documents nor that the documents sought to be filed do not relate to them and the only objection taken is that the plaintiffs cannot be allowed to file the documents at the belated stage. As noted above in the present suit the pleadings are not complete as yet as the replications are yet to

be taken on record and hence it cannot be said that the plaintiffs have filed the present application so belatedly that it cannot be allowed. Further the plaintiffs have very fairly taken the plea of administrative oversight which can occur when the number of documents is voluminous. Thus the plaintiffs have made out a reasonable cause for not filing the documents with the plaint."

39. To similar effect is the judgment of the Co-ordinate Bench of this Court in ***Mahesh Chaudhri & Anr.* v. *IMV India Pvt. Ltd.***, 2019 SCC OnLine Del 9813. The relevant observations in the same are set out below:

"7. Leave to file additional documents can be granted to the plaintiff on establishing reasonable cause for non-disclosure alongwith the plaint. The plea is that in the 130 page written statement filed by the defendant large number of claims are raised against the plaintiff. It is further pleaded by the applicant/plaintiff that the defendant has in the written statement raised various claims which are actually in the nature of counter-claims. Hence, it is pleaded, the need arose to file additional documents along with the replication. In my opinion, the explanation given is a plausible explanation.

XXX XXX XXX

9. I may also note that the present application has been filed when the suit is at an initial stage. Issues are yet to be framed.

10. Another important factor is that it is not the case of the defendant that the documents which are sought to be filed are irrelevant or not bona fide.

XXX XXX XXX

***14. Clearly, sufficient and plausible explanation has been given for filing of the present application and the delay in filing the documents**."*

40. In my view, the present case is covered by the holdings of this Court in ***Hassad Food Company*** (supra) and ***Mahesh Chaudhri*** (supra). The

plaintiff has given sufficient and plausible explanations for not filing the aforesaid documents along with the plaint, as these documents were in Japanese and had to be translated into English before the same could be filed in Court. Admittedly, as noted above, issues are yet to be framed in the case and it is not the case of the defendant no.1 that the aforesaid document are not relevant for the adjudication of the present suit. In fact, the aforesaid documents find a reference in the plaint. No prejudice would be caused to the defendants if the aforesaid documents are allowed to be taken on record at this stage.

41. Accordingly, the present application is allowed and the documents, sought to be filed along with the present application, are permitted to be taken on record, subject to the payment of Rs.50,000/- as costs, which can be set-off as against the costs of Rs.1,00,000/- imposed on the defendant no.2 hereinabove.

AMIT BANSAL, J

APRIL 26, 2022
at
(corrected and released on 2nd May, 2022)